(2)

No. 84-957

FILED
JAN 14 1985
ALEXANDER L. STEVAS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL COLLINS,

Petitioner,

vs.

THE UNIVERSITY OF CINCINNATI and RAYMOND WALTERS COLLEGE,

Respondents,

vs.

THE CITY OF CINCINNATI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

SIDNEY WEIL
Suite 1714, 105 E. 4th Street
Cincinnati, Ohio 45202
(513) 621-2100

JANICE E. YATES
Suite 1714, 105 E. 4th Street
Cincinnati, Ohio 45202
(513) 621-2100

Attorneys for Respondents:
THE UNIVERSITY OF CINCINNATI and
RAYMOND WALTERS COLLEGE

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED FOR REVIEW

When extensive depositions produce no material facts showing abuse of discretion, arbitrary and capricious conduct, is summary judgment properly granted to a university which dismissed a student for academic reasons?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	I
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES and REGULATIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	5
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
Abbariao v. *Hamline University School of Law*, 258 N.W. 2d 108 (Minn. 1977)	9
Balogun v. *Cornell University*, 70 Misc. 2d, 474, 333 N.Y.S. 2d 838 (S.Ct. Madison Cty. 1971)	7
Board of Curators of University of Missouri v. *Horowitz*, 35 U.S. 78, 98 S.Ct. 948 (1978)	5, 7, 8, 10
Connelly v. *University of Vermont and State Agricultural College*, 244 F. Supp. 156 (D. Vt. 1965)	5, 6
Depperman v. *University of Ky.*, 371 F.Supp. 73 (E.D. Ky. 1974)	9
Gaspar v. *Bruton*, 513 F. 2d 843 (10th Cir. 1975)	6
Goss v. *Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975)	8
Hines v. *Rinker*, 661 F.2d 699 (8th Cir. 1981)	9
Mahavongsanan v. *Hall*, 529 F. 2d 448 (5th Cir. 1976)	6
Maitland v. *Wayne State University Medical School*, 76 Mich. App. 631, 257 N.W. 2d 195 (1982)	9
Neel v. *Indiana University Board of Trustees*, 435 N.E. 2d 607 (Ct. App. 1982)	8, 10
Nuttelman v. *Case Western Reserve University*, 560 F.Supp. 1 (N.D. Ohio 1981), *aff'd. without opinion* — F. 2d — (6th Cir. 1981)	6, 10

Page

Patti Ann H. v. *New York Medical College,* 453 N.Y.S. 2d 196 (S.Ct., App. Div. 1982) 8

Schoppelrei v. *Franklin University,* 11 Ohio App. 2d 60, 228 N.E. 2d 334 (10th Dist. 1967) 5

Shuffer v. *Board of Trustees of California State University and College,* 67 Cal. App. 3d 208, 163 Cal. Rptr. 527 (1977) 9

Woodruff v. *Georgia State University,* 304 S.E. 2d 697 (Ga. 1983) 7, 10

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-957

MICHAEL COLLINS,

Petitioner,

vs.

THE UNIVERSITY OF CINCINNATI
and RAYMOND WALTERS COLLEGE,

Respondents,

vs.

THE CITY OF CINCINNATI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Supreme Court of Ohio denied without opinion petitioner's motion to certify the record from the First District Court of Appeals. (Petitioner's Appendix A)

The Ohio First District Court of Appeals issued a memorandum decision (unreported) and judgment entry affirming the trial court decision. (Petitioner's Appendix B)

The Common Pleas Court of Hamilton County, Ohio issued an entry granting summary judgment and memorandum of decision. (Also unreported) (Petitioner's Appendix C)

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTION PROVISIONS, STATUTES AND REGULATIONS

The constitutional provisions are adequately set forth in the petition and Petitioner's Appendix D.

STATEMENT OF THE CASE

Petitioner Michael Collins skipped classes in a professional pharmacology program at the University of Cincinnati and was expelled. He took full advantage of the University's established grievance procedure, and, as a result, was given the opportunity to retake two final examinations and a second chance for reinstatement in the program. He failed the make-up exams and was not reinstated, so he sued the University claiming it had the contractual duty to give him a degree.

Extensive depositions failed to produce any evidence supporting his original claim of breach of contract, and his allegations of arbitrariness, capriciousness and failure of due process all of which were raised before the trial court. The University was granted summary judgment, which the Court of Appeals affirmed and the Ohio Supreme Court refused to review.

Petitioner Collins, in short, has had every opportunity to produce *evidence* supporting his claims, and failed to do so. There being no *material* facts in dispute, the action of the lower courts was not only proper, but required.

Collins' academic problems originated more than nine years ago. In the summer of 1975, he transferred to a two year hospital pharmacy technology (H.P.T.) program at the University of Cincinnati's Raymond Walters College. He had been suspended from a related four year program in the College of Pharmacy for twice failing a required course.

However, once admitted to the program, Collins continued his chronic pattern of extended, unexplained absences from classes and his scholastic performance again deteriorated. At the end of the fall quarter, one of his professors withdrew Collins from his two classes with grades of "F" and the faculty voted to expel him from the program on academic grounds.

Collins thereupon took advantage of the University's grievance procedure. In January, 1976, he filed a single grievance which covered five complaints — two summer grades, his withdrawal from two fall classes with "F's" and his expulsion from the H.P.T. program. Following the procedures spelled out in detail in each student handbook, an Ad Hoc committee of five faculty members from outside the department and two students was selected, in part, by Collins. The committee questioned faculty and student witnesses for two days. The roster included Collins (who testified both days), the professor who was the subject of the grievance and seven students including three students Collins selected from his sixteen classmates. In addition, the committee interviewed five of Collins' other instructors, including one who taught him earlier in the College of Pharmacy, and his advisor. Collins was present for the hearings, questioned several witnesses himself, and submitted two notebooks of supplemental material he considered relevant to his grievance.

The grievance committee gave Collins partial relief; it raised two grades and since other students had been permitted to retake exams, it gave Collins the *choice* of retaking two final exams, prepared and graded by three faculty members other than the professor Collins considered objectionable, or receiving a "W" (withdrawal with no grade).

Collins chose to take make-up exams in both courses. He had a month to prepare. On one exam he answered two questions correctly out of twenty-one; his final grade was "F". On the second exam, he scored 53½% on a scale of 100%, his exam grade was "F," but his final grade was raised to a "C" after a lab grade was included. After the make-up exam results were known, the H.P.T. faculty voted on Collins' reinstatement, pursuant to the decision of the grievance committee. Each voting member had had Collins as a student in at least one class and the vote was unanimous against reinstatement.

In May, 1979, Collins sued the University for breach of an implied contract to give him a degree. The trial court granted the University's motion for summary judgment after it had the opportunity to examine the depositions of Collins' teachers and University administrators, University records, affidavits from Collins' expert witness and his former classmates. The court held that Collins had not put in dispute any *material fact* that involved alleged arbitrary and capricious conduct. Absent that, the court held it would not substitute its judgment for that of the University faculty. (Petitioner's Appendix A)

The appeals court unanimously affirmed the trial court, holding that Collins received full procedural and substantive due process, no matter what standard is used to review an academic decision, whether it be "clearly arbi-

tary and capricious" (*Board of Curators of the University of Missouri* v. *Horowitz,* 435 U.S. 78, 98 S.Ct. 948 (1978)) or "bad faith or malice" (*Connelly* v. *University of Vermont and State Agricultural College,* 244 F. Supp. 156 (D. Vt. 1965)) or "clear abuse of discretion" (*Schoppelrei* v. *Franklin University,* 11 Ohio App. 2d 60, 228 N.E. 2d 334 (10th Dist. 1967)) (Petitioner's Appendix B) The Ohio Supreme Court overruled Collins' motion to certify. (Petitioner's Appendix C)

SUMMARY OF ARGUMENT

This case raises no novel questions of law. Summary judgment was properly granted against Petitioner Collins because his extensive discovery failed to disclose factual issues material to his claim of deprivation of due process, no matter whether the standard is "clearly arbitrary and capricious" (*Horowitz,* supra.) or "clear abuse of discretion" (*Schoppelrei,* supra.).

ARGUMENT

There is absolutely no evidence in this case of arbitrary and capricious treatment. Without support in the record, Petitioner's asserted "Questions of Law" contain a series of argumentative conclusions from which Collins labels the University's grievance procedure as a "sham". Yet, he did not complain about the portions which raised two of his grades; he did not object to being given a choice of retaking two additional exams or having his original grades of "F" expunged. He complains now solely because after he failed the make-up exams, the faculty refused to reinstate him.

When any student is expelled for academic reasons, two

questions are involved. First, was the student, in fact, academically deficient – a question which is beyond judicial review. Second, were school authorities motivated by malice, or did they act arbitrarily and capriciously. *Connelly* v. *University of Vermont and State Agricultural College,* 244 F.Supp. 156, 159 (D. Vt. 1965). Courts do not interfere otherwise. *Mahavongsanan* v. *Hall,* 529 F.2d 448 (5th Cir. 1976).

Collins is repeating the litany of countless students who failed to meet academic standards. In *Connelly,* a third-year medical student complained that he was arbitrarily failed in a pediatrics- obstetrics course when his work was of passing quality. The District Court stated "whether the plaintiff should or should not have received a passing grade . . . is a matter wholly within the jurisdiction of the school authorities, who alone are qualified to make such a determination." *Connelly,* 244 F.Supp. at 161. Such is the case with Collins' make-up exams.

In *Nuttelman* v. *Case Western Reserve University,* 560 F.Supp. 1 (N.D. Ohio 1981) (motion for summary judgment granted), *aff'd. mem.* — F.2d — (6th Cir. 1981), a graduate nursing student accused faculty members of prejudice, using an "unfair" grading curve and evaluation procedures. The District Court wrote "all of these claims are without merit . . . Plaintiff has made no showing that the actions of the defendants in this case were in any way arbitrary or capricious." *Id.* pp. 2 3, citing to *Gaspar* v. *Bruton,* 513 F. 2d 842 (10th Cir. 1975). (The *Gaspar* plaintiff blamed "personality conflicts" with faculty members as the reason for her dismissal; University's motion for summary judgment granted and affirmed.)

Collins further states that, because he was not rein-

stated, improprieties existed in the grievance committee's remedy. The H.P.T. faculty's vote was not arbitrary and capricious *merely* because the teachers refused to reinstate him because a determination of satisfactory work is not based on a specific percentage grade but on an appraisal of a student's record and potential. ***Balogun*** v. *Cornell University,* 70 Misc. 2d 474, 333 N.Y. 2d 838 (S.Ct. Madison Cty. 1971) (again, motion for summary judgment granted). The consensus of faculty opinion, no matter how unflattering to Collins, simply does not create a conspiracy nor does it suggest arbitrary and capricious behavior. *Woodruff* v. *Georgia State University,* 304 S.E. 2d 697 (Ga. 1983) (motion for summary judgment granted and affirmed). The letter which Collins complains stigmatizes him played no part in the faculty's vote not to reinstate him — the letter was written after he failed both make-up exams and the faculty voted. The University never publicized either the exam results, the faculty vote or any other information about Collins' failure to graduate and there is no allegation that it did.

Any academic evaluation of a student is, by its nature, subjective and requires "an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making." *Board of Curators of University of Missouri* v. *Horowitz,* 435 U.S. at 90, 98 S.Ct. at 955. Although the substance of that case dealt with procedural due process, this Court rejected the student Horowitz's argument that a substantive due process violation also existed. Horowitz's allegations of sex discrimination, being dismissed for tardiness, absences and lack of personal hygiene failed to make even a *showing* of arbitrariness or capriciousness.

The faculty vote against reinstating Collins was not

arbitrary or capricious, even though he alleges another marginal student was allowed to repeat the academic year. *Patti Ann H.* v. *New York Medical College,* 453 N.Y.S. 2d 196 (Sup. Ct. App. Div. 1982). The College's decision not to reinstate a marginal student ". . . did not demonstrate bad faith, arbitrariness or irrationality. It was based on a proper and legitimate, though subjective, judgment rendered within a professional and academic milieu."

Collins repeatedly attempts to blur the distinction between academic and disciplinary dismissals. The latter include misconduct, aggressive or disruptive behavior, immorality, even student demonstrations. Dismissals for student misconduct require "an informal give and take" between the student and the administration to determine if the offending conduct took place. The student is entitled to put his conduct in the proper context. *Goss* v. *Lopez,* 419 U.S. 565, 584, 95 S.Ct. 719, (1975); *Gaspar* v. *Bruton,* supra.

Academic dismissals, on the other hand, *do not require a hearing,* not even the informal "give and take" of *Goss. Board of Curators of University of Missouri* v. *Horowitz,* 435 U.S. at 87, 98 S.Ct. at 953. In any case, Collins received more due process than even *Goss* requires, when he used the grievance procedure. Due process did not entitle him to a second grievance hearing to challenge the second faculty vote. *Neel* v. *Indiana University Board of Trustees,* 435 N.E. 2d 607 (Ind. App. 1982). A dental school faculty did not act arbitrarily and capriciously when it voted twice to dismiss a graduate student for excessive absences and poor clinical performance, the second vote following the student's appeal of the first dismissal. The court wrote that the student could reasonably have

expected to be dismissed for his excessive absences, the faculty warnings and dismal academic record. The student's due process rights were satisfied by the conferences following his first dismissal; he was not entitled to additional hearings after the second faculty vote. See also *Hines* v. *Rinker,* 661 F. 2d 699 (8th Cir. 1981)

After examining all Collins' allegations including arbitrary and capricious conduct, the trial court held that Collins put no *material* facts in dispute. He had no evidence to show that his dismissal from the H.P.T. program was for reasons other than his own academic shortcomings. (Petitioner's Appendix C, pp. 50-52) In his petition, Collins again sidesteps that issue, citing decisions on motions to dismiss as if those cases involved the same standard of review as did the resolution of this case on motion for summary judgment. In *Shuffer* v. *Board of Trustees of California State University and College,* 67 Cal. App. 3d 208, 163 Cal. Rptr. 527 (1977), the issue arose in a motion to dismiss and further, unlike Collins, the student was a straight "A" student whose academic qualifications were never in doubt. Similarly, in *Depperman* v. *University of Kentucky,* 371 F.Supp. 73 (E.D. Ky. 1974); *Maitland* v. *Wayne State University Medical School,* 76 Mich. App. 631, 257 N.W. 3d 195 (1977); and *Abbariao* v. *Hamline University School of Law,* 258 N.W. 2d 108 (Minn. 1977), and *Connelly, supra,* at issue was either a motion to dismiss or an action applying the same standard of review. Interestingly in *Abbariao,* the court reversed a motion to dismiss, on grounds the student should have had access to a grievance procedure, a right which Collins had and exercised. But as to his academic qualifications, the court wrote "An adjudicative hearing will not determine whether a student's educational performance was satisfactory. That issue would be

resolved only by regarding the student's examinations, which is a professor's and not a judge's function."

The procedural irregularities of which Collins complained prior to the second faculty vote were remedied by the grievance procedure. The faculty's ultimate decision that Collins was not academically qualified to remain in the H.P.T. program is not a due process issue but an academic decision outside the expertise of the courts and, based on *Board of Curators* v. *Horowitz, Woodruff, Neel, Nuttelman,* etc., not subject to further administrative appeals.

CONCLUSION

Petitioner Collins has repackaged his original breach of contract claim as a breach of due process to address a federal question which does not exist. The petition for writ of certiorari should be denied.

Respectfully submitted,

SIDNEY WEIL

Counsel for Respondents
The University of Cincinnati
and Raymond Walters College

BECKMAN, WEIL,
SHEPARDSON & FALLER
Suite 1714, 105 E. Fourth St.
Cincinnati, OH 45202
(513) 621-2100

CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's Brief in Opposition was served upon the following counsel of record by ordinary U.S. mail, first class, postage prepaid:

1) Charles S. Kamine
Attorney for Petitioner
609 Gwynne Building
602 Main Street
Cincinnati, OH 45202

2) William M. Gustavson
Attorney for Respondent
City of Cincinnati
Room 214, City Hall
Cincinnati, OH 45202

.....

Sidney Weil